No. 470

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

FEDERAL TRADE COMMISSION,
Petitioner,

v.

MINNEAPOLIS-HONEYWELL
REGULATOR COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The majority and dissenting opinions of the Federal Trade Commission (R. 2265-2282) are reported at 44 F. T. C. 390. The opinion of the Court of Appeals for the Seventh Circuit (R. 2308-2315) is reported at 191 F. 2d 786.

JURISDICTION

The judgment of the Court of Appeals (R. 2316) was entered on July 5, 1951, and not on September 18, 1951, as claimed by petitioner. The petition was filed on December

14, 1951, more than 90 days after the entry of judgment; the time for applying for the writ was not extended, and, even if it had been extended for the maximum period permitted by statute, the time would have expired on December 2, 1951. Therefore, as is hereinafter set forth, the petition is untimely, and this Court does not have jurisdiction to entertain it. 28 U. S. C. § 2101(c).

QUESTIONS PRESENTED

(1) Whether this Court has jurisdiction to entertain the petition; and

(2) Whether either of the grounds urged by the petition (pp. 2, 9, 15) constitutes a special or important reason why this Court should grant the petition.

STATUTES INVOLVED

Jurisdiction

28 U. S. C. § 1254, is in part as follows:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

28 U. S. C. § 2101(c), is as follows:

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A

justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."*

Price Discrimination

The applicable portion of Section 2 of the Clayton Act is as follows (15 U. S. C. § 13):

> "(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . ."

STATEMENT

The Facts

Respondent (M-H), a pioneer in the heating controls industry, is, and for a number of years has been, one of the

*An application for an extension of the time for filing a petition for a writ of certiorari cannot be granted unless presented to a Justice of this Court prior to the expiration of the statutory period. *Cresswell* v. *Tillinghast*, 286 U. S. 560 (1932); *Finn* v. *Railroad Commission*, 286 U. S. 559 (1932); Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States § 415 (1951 ed., Wolfson and Kurland.

principal manufacturers of automatic temperature control for oil burners which are used in domestic heating plants.

The Commission found that as a result of the demand for, and public acceptance of, M-H's controls, M-H had at all times sold its controls at prices higher than those charged by its competitors (FF 5, R. 2242).

M-H's most important customers for its oil burner controls are manufacturers of oil burners (R. 39). In 1941 there were approximately 300 oil burner manufacturers. The large majority of oil burner manufacturers are not engaged in fabricating the burners they sell, but rather in assembling the various parts thereof, including motors, pumps, transformers, controls, fans and blower wheels, the several parts usually being purchased by the oil burner manufacturers from different sources (R. 2182, 2309). Thus, oil burner manufacturers ordinarily furnish controls to their customers as parts of complete oil burners (R. 1108-09).

M-H has charged varying prices to oil burner manufacturers for controls and that fact was used as the basis for the principal charge made by the Commission in this proceeding.

M-H's competitors are the 15 other control manufacturers in the United States, chief among them being Mercoid Corp., Penn Electric Switch Co. and Perfex Corp. (R. 48-49; FF 6, R. 2242). Each of the principal control manufacturers solicited business from, and entered into contracts with, most of the oil burner manufacturers including *all* the larger accounts (R. 59-60, 749, 801-02). Since no important oil burner manufacturer used exclusively the controls of a single control manufacturer, competition was "ever present" (R. 1528), and, as the Commission

found, M-H was engaged in active and substantial competition with its competitors (FF 2, R. 2241). During the period in question, although M-H was the largest manufacturer of controls for oil burners, the total business of M-H's competitors increased (R. 222, 231-32, 418-21, 798, 826), while M-H's share of the available business was reduced (R. 876-77). Illustrative of the competitive situation that existed are the facts that in 1941 M-H lost to its competitors 53% of the control business of 31 customers who previously had for the most part used M-H's controls; and in the same year, 126 of M-H's other customers also purchased competitive controls (R. 961-64).

Prior Proceedings

This proceeding was instituted by the service on M-H of the Commission's complaint (R. 2) dated February 23, 1943, containing three counts. Count I charged M-H with violation of Section 5 of the Federal Trade Commission Act; Count II, realleging matters set forth in Count I, charged violation of Section 3 of the Clayton Act; and Count III charged violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. In Count III it was alleged that M-H had sold its controls to some of its oil burner manufacturer-customers at prices different from those charged others of such customers with resulting unlawful discriminations in price.

Hearings were conducted before a Trial Examiner from August, 1943, to October, 1945. On February 21, 1946, the Trial Examiner filed his Report (R. 2166-2203), wherein he recommended that an order be issued requiring M-H to cease and desist from the acts and practices charged

under Counts I and II, and that the charges set forth in Count III be dismissed (R. 2203). The latter recommendation was based upon the Trial Examiner's findings that

> (1) the differences in M-H's prices did not tend substantially to injure competition either among M-H and its competitors or among M-H's customers;
>
> (2) some of M-H's prices were justified by differences in its costs; and
>
> (3) M-H's other prices were made in good faith to meet the competition of its competitors.

On January 14, 1948, the Commission rendered its decision and issued its order to cease and desist. The Commission followed the recommendations of the Trial Examiner as to Counts I and II of the complaint,* but the majority declined to follow the Trial Examiner's recommendation as to Count III, except that it agreed that some of M-H's varying prices were justified by differences in M-H's costs. Com. Mason, dissenting, agreed with the Trial Examiner that Count III should be dismissed (R. 2276-82).

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*Com. Mason concurred (R. 2277) as to the disposition of Count II which, as noted above, merely alleged that certain practices, set forth in Count I as violative of the Federal Trade Commission Act, were also violative of Section 3 of the Clayton Act. As to the other practices alleged to be unlawful in Count I, Com. Mason dissented (R. 2276-77) on the ground that M-H had discontinued those practices immediately upon the reversal by this Court of two decisions of the Court of Appeals for the Seventh Circuit which had approved such practices. See *Mercoid Corp.* v. *Mid-Continent Investment Co., et al.*, 320 U. S. 661 (1944) and *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680 (1944). Com. Mason, in his dissent as to Count I, said (R. 2277): "I see no profit in shooting a tiger stuffed and mounted so long ago."

The conclusion of the majority of the Commission that M-H's varying prices injured competition was predicated upon its paradoxical theory that M-H, by lowering its prices to meet competition, had by that very act injured competition.

The Commission's formal finding on that point, namely, that M-H's varying prices had diverted trade to M-H from its competitors and, therefore, had had a "substantial injurious effect upon competition" (FF 19, R. 2256), is amplified by the following statement in the opinion of the Commission (R. 2273):

> "The competitive effects of respondent's [M-H's] discriminatory prices on other manufacturers of controls are persuasively indicated by its own arguments that its discriminatory prices were made for the purpose of meeting competition. These arguments show that respondent's [M-H's] discriminatory prices were made to retain the business of certain customers or to secure the business of others and that they were largely successful in doing so. To the extent that business is held by or diverted to respondent [M-H] from its competitors by its discriminatory prices and unfair practices [*i.e., we suppose by lowering its prices in good faith to meet competition*], competition has been adversely affected within the meaning of the law . . ."

The Commission majority's paradoxical theory has since been specifically rejected by this Court in *Standard Oil Co.* v. *Federal Trade Commission,* 340 U. S. 231, 250 (1951).

The Commission's order (R. 2262-65) is in four parts. Parts I and II enjoin M-H from engaging in the acts and practices charged in Counts I and II of the complaint; and

Part IV is merely the customary direction as to the compliance report. Part III (R. 2264), which was entered pursuant to Count III of the complaint, directs that M-H

> ". . . forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality as among oil-burner manufacturers purchasing said automatic temperature controls and other furnace controls——
>
> "1. By selling such controls to some oil-burner manufacturers at prices materially different from the prices charged other oil-burner manufacturers who in fact compete in the sale and distribution of such furnace controls, when the differences in price are not justified by differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which such products are sold or delivered."

On March 11, 1948, M-H filed with the Court of Appeals for the Seventh Circuit its petition to review and set aside the order of the Commission (R. 2283), and, subsequently, the Commission filed a cross-petition for affirmance and enforcement. M-H, however, did not press its petition as to Parts I and II of the order, and, before the Court of Appeals, announced that it did not challenge those Parts of the order. Neither M-H nor the Commission briefed or argued before the Court of Appeals any question arising out of Part I or Part II.

On July 5, 1951, the Court of Appeals handed down its opinion (R. 2308) unanimously reversing Part III of the order and dismissing Count III of the complaint, holding that, on the entire record, the Commission acted arbitrarily when it rejected the findings of the Trial Examiner that

M-H's pricing practices did not tend to injure competition. That being the basis for its decision, the court did not even reach the question whether M-H's varying prices were justified, as M-H strongly contended, on the ground that the lower of those prices were made in good faith to meet the equally low prices of its competitors. *Cf. Standard Oil Co. v. Federal Trade Commission, supra,* 340 U. S. 231 (1951). The court, in its opinion, did not refer to Parts I and II of the order except as follows (R. 2308):

> "... Since M-H does not challenge Parts I and II of the order based on the first two counts of the complaint we shall make no further reference to them."

The judgment of the court (R. 2316), reversing Part III of the order and dismissing Count III of the complaint in accordance with its opinion, was entered on July 5, 1951, the day that the opinion was filed. A certified copy of said judgment, in lieu of mandate, was issued to the Commission on August 6, 1951.

The Commission did not ask for rehearing, but about August 21, 1951, submitted to the court a proposed "Final Decree" and a typewritten memorandum which recognized that judgment as to Part III of the order had already been entered, but which argued that the court should affirm and enforce Parts I and II as requested in the Commission's cross-petition. The proposed "Final Decree" contained, in addition to provisions affirming and enforcing Parts I and II, a provision, identical in substance and practically identical in wording to the judgment of July 5, reversing Part III of the order and dismissing Count III of the complaint. On September 18, 1951, the court entered the decree proposed by the Commission (R. 2316-19). On December

14, 1951, the Solicitor General filed the petition for writ of certiorari to review the judgment in respect of Part III of the order.

ARGUMENT

POINT I

THE COURT DOES NOT HAVE JURISDICTION TO ENTERTAIN THE PETITION.

That a petition for a writ of certiorari must be filed within 90 days after entry of judgment (unless the time be extended by a Justice of this Court for a period not to exceed 60 days more) is not open to question, 28 U. S. C. § 2101(c). If a petition is untimely, the Court does not have jurisdiction to entertain it. *Hope Basket Company, et al.* v. *Product Advancement Corporation, et al.*, 72 Sup. Ct. 44 (1951); *Department of Banking* v. *Pink*, 317 U. S. 264 (1942); Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States § 409 (1951 ed., Wolfson and Kurland).

If the judgment of the Court of Appeals which was entered July 5, 1951, was the judgment of that court with respect to Part III of the Commission's order, the petition now before this Court, which was filed more than 150 days after July 5, 1951, is untimely and must be denied.

The July 5 judgment is as follows (R. 2316):

> "This cause came on to be heard on the transcript of the record from the Federal Trade Commission and was argued by counsel.
>
> "On consideration whereof, it is ordered and adjudged by this Court that Part III of the decision

> of the Federal Trade Commission entered in this cause on January 14, 1948, be, and the same is hereby, Reversed, and Count III of the complaint upon which it is based be, and the same is hereby Dismissed."

From the language of the judgment there appears to be no basis for contending that it was interlocutory, or that the court intended to give the case any further consideration. It would seem, from the face of the judgment, that the court intended thereby to make final disposition of the case. What appears from the face of the judgment is confirmed by the record, including the opinion of the court below.

Accordingly, there is not any basis for disputing that the judgment of July 5 was the judgment of the court as to Part III of the order. Petitioner, however, seeks to review the decree of September 18, 1951, which affirmed and enforced Parts I and II of the Commission's order, and also reiterated the judgment of July 5 as to Part III. The Commission, in its memorandum dated August 21, 1951 in support of that decree, recognized that the court had already entered judgment as to Part III of the order and did not seek any alteration of that judgment. Thus, the memorandum commenced as follows:

> *"On July 5, 1951 the Court entered its opinion and judgment reversing Part III of the decision of the Federal Trade Commission dated January 14, 1948 and dismissing Count III of the complaint upon which it is based.* No disposition has been made of the Cross-Petition filed by the Commission for affirmance and enforcement of the entire decision. The Commission takes the position that its Cross-Petition should be in part sustained, *i.e.*, to the extent that the Court should make and enter herein a decree affirm-

> ing Parts I and II of the Commission's order to cease and desist and commanding Minneapolis-Honeywell Regulator Company to obey the same and comply therewith . . ." [Emphasis supplied]

A timely petition for rehearing, of course, tolls the running of the time within which to apply for a writ of certiorari, *Department of Banking* v. *Pink*, 317 U. S. 264, 266 (1942). The Commission, however, never made any such petition. The typewritten memorandum of August 21, which the Commission filed in support of the decree more than 15 days after the entry of the judgment of July 5, was not, and did not purport to be, a petition for rehearing. In the first place, as noted above, it did not seek any alteration of the judgment of July 5. Furthermore, it did not comply with the requirements of Rule 22 of the Court of Appeals either as to time of filing or as to form:

> "*Rehearing.*—Printed petition for rehearing may be filed within 15 days after entry of judgment. Three copies of such petition shall be served forthwith by the clerk of this court upon the opposing party, who within 10 days from such service may file a printed answer, three copies of which shall be served on the opposing party, and the petition shall be determined without oral argument unless otherwise ordered. Thirty copies of such petition and answer shall be filed with the clerk of this court."

The proceedings in this case subsequent to the entry of the judgment of July 5 did not affect in any way the court's disposition of Part III of the order, but were solely concerned with Parts I and II of the order. Parts I and II ordered M-H to cease and desist from practices found by

the Commission to be violative of Section 5 of the Federal Trade Commission Act and Section 3 of the Clayton Act and are, therefore, wholly separate from, and have no relation to, Part III of the order which dealt with practices found by the Commission to be violative of Section 2 of the Clayton Act. Moreover, in the memorandum of August 21, which the Commission filed, it did not present a substantive question with respect to Parts I and II of the order, but only the narrow and technical question whether the Court of Appeals, which had not adjudicated any issue arising therefrom, should nevertheless affirm and enforce Parts I and II without regard to the fact that M-H, by announcing its decision not to press its petition as to those Parts of the order, had already placed itself under the duty to comply therewith. That question was not even remotely related to Part III of the order.

The decree of September 18 did nothing more as to Part III of the order than to restate the court's judgment of July 5. Its only function was to dispose of Parts I and II of the order as to which the Court of Appeals had made no adjudication; but over which, according to the Commission's theory, that court had obtained jurisdiction.

The only issues presented to and decided by the Court of Appeals in its opinion of July 5 arose from Part III of the order. The judgment of July 5, final on its face, made complete and unambiguous disposition of Part III, and was in complete accord with the opinion of the court. The court was never asked by the Commission to alter that judgment, and there is no indication that the court ever considered altering it. The fact is that the court did not alter it.

It is submitted that the judgment of July 5, 1951, was the judgment of the Court of Appeals as to Part III of the order, that the petition for a writ of certiorari filed December 14, 1951, is untimely, and that, accordingly, the petition should be denied.

POINT II

PETITIONER HAS NOT SHOWN ANY REASON WHY THE PETITION SHOULD BE GRANTED.

In stating the questions to be considered by this Court, in specifying the errors to be urged, and in advancing reasons why, in its opinion, a writ of certiorari should be granted, petitioner has urged only two points which are:

(1) that the decision of the court below is in conflict with the decision of this Court in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37; and

(2) that the court below misapplied the decision of this Court in *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474.

Neither of those points has merit.

A. The Decision of the Court Below Is Not in Conflict with the *Morton Salt* Case.

As this Court recognized in *Corn Products Refining Co. et al.* v. *Federal Trade Commission*, 324 U. S. 726, 738 (1945), Section 2(a) of the Clayton Act does not prohibit all discriminations in price, but only those discriminations whose effect

> "may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . ."

Petitioner contends, however, that this Court has eliminated the above-quoted language from the statute by holding in the *Morton Salt* case that a showing that a seller has sold a commodity of like grade and quality to two or more customers at substantially different prices gives rise to a *conclusive presumption* that such price differentials may have the defined effect on competition (Pet., pp. 11-15).

Such an interpretation of the *Morton Salt* decision would render nugatory that part of Section 2(a) of the Act quoted above and make discriminations in price unlawful, without regard to their effect on competition. Such an interpretation would be contrary to everything that this Court, or any other court, has ever said on the subject.

Such was not the holding of this Court in the *Morton Salt* case. The Court said (334 U. S. at p. 47) that ". . . the Commission is authorized by the Act to bar discriminatory prices upon the 'reasonable possibility' that different prices for like goods to competing purchasers may have the defined effect on competition" (citing the "injury to competition" language of Section 2(a) of the Act). The Court not only pointed out that the Commission in the *Morton Salt* case had made adequate findings that there was a reasonable possibility of injury to competition (pp. 45-7), but also determined that the evidence in that case supported such findings (pp. 47-51)—specifically, the showing that the seller's differentials in the price of salt

between purchasers who competed in the resale of such salt were "sufficient in amount to influence their resale prices" (p. 47).

This Court did not hold that price differences alone give rise to a conclusive presumption of injury to competition, or that all price discriminations are unlawful discriminations. The Court's opinion and its approving reference (p. 45, n. 13) to *Samuel H. Moss, Inc.* v. *Federal Trade Commission*, 148 F. 2d 378, 379 (2d Cir. 1945), *cert. denied*, 326 U. S. 734 (1945), make that clear.

This Court did hold that it was sufficient to make out a *prima facie* case for the Commission to prove that a seller has charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors; from which it follows that unless the seller sustains the burden of proof which is thereby placed upon him, the Commission could properly conclude that the price discrimination was unlawful.

In the *Morton Salt* case the seller did *not* sustain its burden of proof with respect to injury to competition.

In the instant case, the situation is entirely different. The court below recognized that the burden of proof was on M-H to show that M-H's prices had not tended to injure competition, either among M-H and its competitors or among M-H's customers, and it found, upon examination of the whole record, that M-H had sustained that burden. Thus, with respect to the question whether competitor competition had been injured the court said (R. 2312-13):

> ". . . Even though we assume that the burden of proving absence of injury to competition falls on the accused (see *Samuel H. Moss* v. *Federal Trade Commission*, 148 F. 2d 378; *Federal Trade Commission* v. *Standard Brands, Inc.*, decided by the Second

> Circuit March 30, 1951, modified June 4, 1951), we think M-H has met that burden with respect to its competitor competition."

Similarly, with respect to the question whether customer competition had been injured the court said (R. 2315):

> "We are convinced that here 'the inferences on which the . . . findings were based were so overborne by evidence calling for contrary inferences that the findings . . . could not, on the consideration of the whole record, be deemed to be supported by "substantial" evidence.' (*National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 502.)"

Furthermore, contrary to petitioner's contention (Pet., p. 9), the court below did not apply "an unduly restrictive standard of injury to competition—actual injury rather than a reasonable possibility thereof— . . ." The court stated that:

> ". . . it cannot be said that [M-H's] discriminatory price differentials substantially injure competition or that there is any reasonable probability or even possibility that they will do so. Cf. *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, 738, 742; *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 46. And a mere possibility of such injury is insufficient to sustain a charge of violation of the Act. *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, 742."

Manifestly, there is not any conflict between the decision of this Court in the *Morton Salt* case and the decision of the court below in the instant case.

B. The Court Below Did Not Misapply the Decision of This Court in the *Universal Camera* Case.

In *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474 (1951), this Court held that the Court of Appeals for the Second Circuit had erred in deeming itself bound by the NLRB's rejection of its Trial Examiner's findings, and remanded the case to that court for reconsideration of the record, with instructions that it should "accord the findings of the trial examiner the relevance that they reasonably command in answering the comprehensive question whether the evidence supporting the Board's order is substantial." (340 U. S. at p. 497). Elsewhere in its opinion, the Court indicated that reviewing courts should give a trial examiner's report "such probative force as it intrinsically commands" (p. 495) and recognized "that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case, has drawn conclusions different from the Board's than when he has reached the same conclusion" (p. 496).

In the instant case, as in the *Universal Camera* case, the administrative tribunal, with one member dissenting, rejected the findings of its Trial Examiner.

The court below in the instant case, in reviewing the decision of the Commission, was guided by the principles laid down by this Court in the *Universal Camera* case. The court below noted that under the rule of that case, it was its duty to examine the record as a whole, including the rejected report of the Trial Examiner, in order to determine whether the evidence supporting the Commission's order was substantial. The court also indicated that the dissent of an experienced member of the Commission from the Commis-

sion's findings and conclusions was in itself a reason to scrutinize carefully the evidence relied upon to support such findings and conclusions (R. 2311). The court recognized, however, that the findings of the Trial Examiner must be considered along with " 'the consistency and inherent probability of testimony' " (R. 2311), and that such findings are not " 'as unassailable as a master's' " (R. 2312). Clearly, as shown by its opinion, the court carefully followed the principles laid down by this Court, and was keenly aware that those principles were intended to be applied with caution.

Thus guided, the court below came to the conclusion, from its examination of the record as a whole, that the Commission had acted arbitrarily in rejecting the trial examiner's findings to the effect that M-H's pricing practices had not tended substantially to lessen competition. The court did not hold that the Commission was arbitrary merely because it reversed the Trial Examiner, but because on the whole record, the Trial Examiner was right, and the Commission's findings were not supported by substantial evidence (R. 2312, 2315).

The court below did not misapply, but rather faithfully followed, the decision of this Court in the *Universal Camera* case. The assertions by petitioner that the court gave more weight to the Trial Examiner's report than it ought to have given, and that the court merely substituted its judgment for that of the Commission, are unjustified. The court below did no more than perform its *statutory duty* to set aside such action, findings and conclusions of the Commission as it found to be unsupported by substantial evidence, arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. Administrative Procedure Act § 10(e), 5 U. S. C. § 1009(e).

Accordingly, there is not any occasion for this Court to exercise its power to review the decision of the court below. A writ of certiorari will be granted only for special and important reasons (Rules of the Supreme Court of the United States, Rule 38(5)); and this Court has clearly indicated that in the light of that Rule, it will "leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality", *NLRB* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 502 (1951). As the Court said in *Radio Corporation of America et al.* v. *United States et al.*, 341 U. S. 412, 415 (1951):

> "... in considering the question of sufficiency of evidence to support an administrative order this Court must and does rely largely on a first reviewing court's conclusion. *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474."

In the *Universal Camera* case, after stating that a Court of Appeals must set aside the findings of an administrative agency when, upon its review of the record in its entirety, such findings are found to be not supported by substantial evidence, the Court said (340 U. S. at pp. 490-91):

> "... Our power [*i.e.*, the power of the Supreme Court] to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

CONCLUSION

The petition for a writ of certiorari should be denied.

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